No. 04-771

Supreme Court, U.S.
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In The Supreme Court of the United States

JASON L. DIEDRICH,

Petitioner,

v.

CITY OF NEWPORT NEWS, VIRGINIA; EDGAR E. MARONEY, individually and as City Manager of the City of Newport News; DENNIS A. MOOK, individually and as Chief of Police, Newport News Police Department,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

Allen L. Jackson
Chief Deputy City Attorney
2400 Washington Avenue
9th Floor
Newport News, VA 23607
(757) 926-8416
Counsel for City of Newport News

Shepherd D. Wainger, Esquire
Kaufman & Canoles, P.C.
150 West Main Street, Ste. 2100
Post Office Box 3037
Norfolk, VA 23514-3037
(757) 624-3015
Counsel for Edgar E. Maroney and Dennis A. Mook

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

Rule 15.2 provides in part that "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." This Court ordinarily does "not decide in the first instance issues not decided below." Nat'l Coll. Athletic Ass'n v. Smith, 525 U.S. 459, 470 (1999). Accordingly, the Respondents note that Questions 2, 3, 4, 6 and 8 were not presented to the District Court.

STATEMENT OF THE CASE

Rule 15.2 provides in part that,

> [i]n addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition.

Accordingly, the Respondents note that the documents attached to the Petition as Appendices A through E are not a part of the record of the proceeding before the District Court or the Court of Appeals.

Moreover, the Petition omits from the Statement of the Case that Mr. Diedrich challenged the City's allegedly punitive transfer through state court proceedings, which were decided adversely to him, as pointed out in the District Court's opinion. See Pet. for Writ of Cert., App. F at 10. Specifically, the state court held that as a matter of state law Mr. Diedrich could not challenge the City's decision to assign him to different duties.

ARGUMENT

State law determines whether a person possesses a property interest subject to the protections of the Fourteenth Amendment. The Fourth Circuit has held consistently that a government employee who has a protected interest in continued employment does not have a protected interest in a particular assignment. Fields v. Durham, 909 F.2d 94, 98 (4th Cir. 1990), cert. denied, 498 U.S. 1068 (1991); Huang v. Bd. of Governors of Univ. of North Carolina, 902 F.2d 1134, 1141-1142 (4th Cir. 1990); Royster v. Board of Trustees, 774 F.2d 618, 620-621 (4th Cir.1985). The Petition identifies no authority holding to the contrary.

Instead, the Petition relies upon a decision of the Virginia Supreme Court in which a terminated local government employee who was returned to work by the decision of a grievance panel received an assignment to lesser work than his prior employment one day after his return to duty. See generally Zicca v. City of Hampton, 240 Va. 468, 397 S.E.2d 882 (1990). The District Court properly distinguished Mr. Diedrich's case, noting that the City returned Mr. Diedrich to a position comparable to the one he had previously held, and left him so assigned for five years. See Pet. for Writ of Cert., App. F at 10.

The District Court also properly disposed of Mr. Diedrich's liberty interest claim, noting that Mr. Diedrich continued to be employed by the City in the position of police officer, albeit in an assignment which he dislikes. Pet. for Writ of Cert., App. F at 6-7, relying on Morrash v. Strobel, 842 F.2d 64, 68-69 (4th Cir. 1987).

Finally, the District Court and the Fourth Circuit held that Mr. Diedrich had failed to identify a property interest or liberty interest protected by the Fourteenth Amendment. The Petition fails to identify any decisions of this Court or of other courts that conflict with that decision so as to support Questions 9 and 10.

CONCLUSION

The Complaint in this matter failed to state a claim upon which relief can be granted. The District Court and the Fourth Circuit Court of Appeals properly so held, for reasons stated here and in the opinion of the District Court, which was adopted by the appellate court. This Court should refuse to grant Mr. Diedrich a writ to review those decisions.

Respectfully submitted,

CITY OF NEWPORT NEWS,
EDGAR E. MARONEY, and
DENNIS A. MOOK

Allen L. Jackson
Chief Deputy City Attorney
2400 Washington Avenue
9th Floor
Newport News, VA 23607
(757) 926-8416
Counsel for
City of Newport News

Shepherd D. Wainger, Esquire
Kaufman & Canoles, P.C.
150 West Main Street, Ste. 2100
Post Office Box 3037
Norfolk, VA 23514-3037
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and Dennis A. Mook

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